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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 387

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

C. W. VOLLMER & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1954

CERTIORARI GRANTED NOVEMBER 22, 1954

United States Court of Appeals, Fifth Circuit

No. 14749

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, APPELLANT,

vs.

C. W. VOLLMER & COMPANY, INC., a Corporation, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 14749

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT,

versus

C. W. VOLLMER & COMPANY, INC., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

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1

United States District Court
Eastern District of Louisiana, New Orleans Division

No. 3280 (Civil Action)

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, PLAINTIFF,

vs.

C. W. VOLLMER & COMPANY, INC., a Corporation, DEFENDANT.

APPEARANCES:

Messrs. Earl Street, Regional Attorney, William S. Tyson, John J. Babé, T. Hagan Allin and Harry Campbell, Attorneys for Plaintiff-Appellant.

Messrs. Deutsch, Kerrigan and Stiles, and Robert E. Leake, Jr., Attorneys for Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 2nd day of September, 1953, at the City of New Orleans, Louisiana.

2 COMPLAINT—filed December 5, 1951

(Number and Title omitted)

I

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 *et seq.*), hereinafter called the Act.

II

Jurisdiction of the action is conferred upon the court by Section 17 of the Act.

III

The defendant, C. W. Vollmer and Company, Inc., is, and at all times hereinafter mentioned was, a corporation

organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business at 609 Cotton Exchange Building, Houston, Harris County, Texas. The defendant corporation is doing business in the State of Louisiana and maintains an office near Algiers, Louisiana, at which place service may be had upon Mr. C. W. Vollmer, President, within the jurisdiction of this court.

IV

At all times hereinafter mentioned, defendant employed and is employing in interstate commerce, within the meaning of the Act, approximately 85 employees in and about its place of business in and in the vicinity of Algiers, Orleans Parish, Louisiana, and elsewhere, in the enlargement, maintenance, repair, improvement, and extension, of instrumentalities of interstate commerce and in particular since about September, 1950, such employees have been, and are now, employed in the extension, enlargement, and improvement of the Gulf Intercoastal Canal and
3 Waterway, on and over which goods are regularly shipped and transported in interstate commerce, within the meaning of the Act.

V

Defendant repeatedly has violated and is violating the provisions of Section 7 and 15(a)(2) of the Act by employing many of its employees in interstate commerce, within the meaning of the Act, as aforesaid, for workweeks longer than 40 hours since September, 1950, without compensating these employees for their employment in excess of 40 hours, in workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VI

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act, in that since September, 1950, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight-time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

VIII

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove
4 alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanenty enjoining and restraining defendant, its agents, servants, employees, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

William S. Tyson,
Solicitor
John J. Babé,
Assistant Solicitor,
Earl Street,
Regional Attorney,
T. Hagan Allin,
Associate Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, Office of the Solicitor, Department of Labor, Room 222, Fidelity Bldg., Dallas, Texas or Office of the Solicitor, Department of Labor, Washington, D. C.

5 ANSWER—filed January 4, 1952

(Number and Title Omitted)

First Defense

This court is without jurisdiction of this cause in that none of defendant's operations described in the complaint was, or is, in interstate commerce or in the production of goods for interstate commerce, and none of defendant's employees was, or is, engaged in interstate commerce or in the production of goods for interstate commerce, within the purview of the Fair Labor Standards Act.

Second Defense

First

Defendant admits the truth of the averments of fact contained in paragraphs III and VI of the complaint.

Second

Defendant denies the truth of the averments of fact contained in paragraphs II, IV, VII and VIII of the complaint.

Third

The averments of paragraph I of the complaint are not averments of fact as to which responsive pleading is required or permitted, but, insofar as defendant is required to answer thereto, defendant denies the truth thereof.

Fourth

Defendant admits that since September, 1950, some of its employees at Algiers, Louisiana, worked in excess of forty (40) hours per week without being compensated for such excess at rates not less than one and one-half times their regular rate of pay, but denies the truth of the remaining averments of fact contained in paragraph V of the complaint.

6 WHEREFORE defendant prays that this suit be dismissed at complainant's cost.

ROBERT E. LEAKE, JR.,
of
DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

CERTIFICATE

I certify that copies of the foreging answer have been mailed to Honorable Earl Street, attorney for plaintiff, at his office, Room 222 Fidelity Building, Dallas, Texas, this 4th day of January, 1952.

ROBERT E. LEAKE JR.

7 INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT--Filed SEPT. 2, 1952

(Number and Title Omitted)

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following interrogatories on the defendant above named under Rule 33, Federal Rules of Civil Procedure, to be answered in accordance with said rule within fifteen (15) days from the date of service:

I

(a) On what date did you begin work under construction contract No. 16-047-eng-796, which was awarded you by the Corps of Engineers, Department of the Army, and under the terms of which you contracted, according to the terms and specifications set out in such contract, to perform the work for construction of earth work and Emergency Dam Storage for Algiers Lock in Orleans Parish, Louisiana?

(b) Is work on the job set out in (a) above still in progress?

(c) If the answer to (b) above is No, state when the job was completed and when it was accepted by the Corps of Engineers, Department of the Army.

II

(a) State for each workweek, giving the beginning and ending dates of such workweeks, how many employees were employed in work on the project set out in Interrogatory I(a) above.

(b) How many of the employees mentioned in subsection (a) above worked in excess of 40 hours in each workweek?

(c) Were any of the employees mentioned in subsection (b) above paid additional compensation for hours worked in excess of 40 during the workweek at one and one-half times the regular rate of pay at which they were employed?

8

III

(a) List all construction projects upon which you have been or are now engaged, either as prime contractor or subcontractor, which were awarded either to you or your prime contractor by the Corps of Engineers, Department of the Army, for the period since January 1, 1948.

(b) In connection with subsection (a) above, state the nature of each such project in detail, giving the contract numbers, location, the work the contracts called for, dates work began and terminated and the number of employees employed thereon.

IV

(a) Were any of your employees employed on projects referred to in Interrogatory No. III above employed for workweeks longer than 40 hours during the period of their employment?

(b) If the answer to subsection (a) above is in the affirmative, state which projects and whether or not such employees were paid additional compensation for hours worked in excess of 40 during the workweek at one and one-half times the regular rate of pay at which they were employed.

V

State how long you have been engaged in the construction and contracting business.

WILLIAM S. TYSON,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas; or, Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

T. Hagan Allin, one of the attorneys of record for the plaintiff, certifies that he served a full, true and correct copy of the within and foregoing Interrogatories upon Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorneys for defendant, by placing a copy of the same in the United States mail in a franked envelope addressed to him at his last-known address at Hibernia Bank Building, New Orleans, Louisiana, on the 25th day of September, 1952.

T. HAGAN ALLIN.

9 OBJECTION OF DEFENDANT TO INTERROGATORIES NOS. III AND IV—Filed Filed Oct. 10, 1952

(Number and Title Omitted)

Defendant hereby objects to Interrogatories No. III and IV, all subsections, propounded to it by plaintiff on September 29, 1952, on the grounds that the information sought thereby neither is relevant nor could lead to relevant information in that the interrogatories make inquiry as to facts entirely outside the scope of the pleadings, and that same are unduly burdensome, in that they require detail examination of defendant's business records for a period in excess of four years.

WHEREFORE defendant moves the court for an order striking the interrogatories mentioned above and relieving it from the duty of answering them.

ROBERT E. LEAKE, JR., of
DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Bldg.,
New Orleans Bank Bldg.,
New Orleans 12,
Attorneys for Defendant.

NOTICE

To: Honorable Earl Street,
222 Fidelity Building,
Dallas, Texas,
Attorney for Plaintiff.

Please take notice that the foregoing objections to the interrogatories served in this cause by you on September 29, 1952, will be brought for hearing before the United States District Court at the United States Post Office Building, New Orleans, Louisiana, on Wednesday, October 22, 1952, at 11:00 o'clock AM, or as soon thereafter as counsel can be heard.

New Orleans, October 10, 1952.

ROBERT E. LEAKE, JR.

CERTIFICATE

I certify that two copies of the foregoing objections and notice thereof have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 10th day of October, 1952.

ROBERT E. LEAKE, JR.

10 ANSWER OF DEFENDANT TO INTERROGATORIES PROPOUNDED BY PLAINTIFF—Filed Oct. 14, 1953

(Number and Title Omitted)

Now comes defendant, and makes the following answers to the interrogatories served on it by plaintiff on September 29, 1952.

TO THE FIRST INTERROGATORY:

(a) On or about September 10, 1950.

(b) Yes.

(c) No answer required.

TO THE SECOND INTERROGATORY:

For answer to this interrogatory, defendant annexes hereto photostatic copy of report giving the information requested.

Further answering sub-section (c), respondent answers that from September 10, 1950, to September 30, 1950, employees were paid one and one-half times their regular rate of pay for hours worked in excess of forty hours per week. From October 1, 1950, to November 3, 1951, employees were paid one and one-half times their regular rate of pay for hours worked in excess of eight hours per day, but not for hours worked in excess of forty hours per week. From November 4, 1951, to July 19, 1952, the job was idle, and since July 20, 1952, employees have been paid at one and one-half times their regular rate of pay for hours worked in excess of eight hours per day and in excess of forty hours per week.

TO THE THIRD AND FOURTH INTERROGATORIES:

Defendant heretofore has filed objections to these interrogatories.

TO THE FIFTH INTERROGATORY:

Since on or about January 2, 1947.

C. W. VOLLMER & CO., INC.,
By C. W. VOLLMER,
Pres.

11 STATE OF LOUISIANA,
PARISH OF ORLEANS:

Before me, the undersigned authority, personally came and appeared C. W. VOLLMER, who, after first being by me duly sworn, deposed:

That he is the duly elected and qualified president of C. W. Vollmer & Co., Inc., as such authorized to execute this affidavit; that he read the foregoing answers to interrogatories, and that the same are true.

C. W. VOLLMER.

Sworn to and subscribed before me this 14th day of October, 1952.

WILLIAM M. BENJAMIN,
[SEAL] *Notary Public, Parish of Orleans, State of La.*

My Commission is issued for life.

CERTIFICATE

I certify that two copies of the foregoing answers to interrogatories have been served on plaintiff by mailing same to Honorable Earl Street, counsel for plaintiff, at his office, 222 Fidelity Building, Dallas, Texas, this 14th day of October 1952.

ROBERT E. LEAKE, JR.

C. W. Vollmer & Co., Inc.
Earth Work and Emergency Dam Storage for Algiers Lock
Orleans Parish, Louisiana

Workweek		Number of Employees on Payroll	Number of Employees Worked in Excess of 40 Hours per week	Were any employees paid additional compensation for hours worked in excess of 40 per week, at one and one-half times the regular rate of pay?
Beginning	Ending			
9-10-50	9-16-50	19	0	
9-17-50	9-23-50	41	8	Yes
9-24-50	9-30-50	52	25	Yes
10- 1-50	10- 7-50	63	43	Yes
10- 8-50	10-14-50	73	55	Yes
10-15-50	10-21-50	61	11	Yes
10-22-50	10-28-50	70	46	Yes
10-29-50	11- 4-50	64	50	Yes
11- 5-50	11-11-50	65	50	No
11-12-50	11-18-50	64	54	Yes
11-19-50	11-25-50	65	54	Yes
11-26-50	12- 2-50	65	50	Yes
12- 3-50	12- 9-50	26	3	No
12-10-50	12-16-50	35	7	No
12-17-50	12-23-50	26	1	No
12-24-50	12-30-50	22	1	No
12-31-50	1- 6-51	18	1	No

14 ANSWER OF PLAINTIFF TO DEFENDANT'S OBJECTIONS TO INTERROGATORIES III AND IV—Filed October 16, 1952

(Number and Title Omitted)

Defendant's objections to plaintiff's Interrogatories Nos. III and IV appear to be primarily based on the contention that information sought is neither relevant nor material to the issues raised in plaintiff's complaint herein in that said interrogatories make inquiry as to facts entirely outside the scope of the pleading.

Plaintiff's complaint not only charges defendant with violations of the Fair Labor Standards Act insofar as its employees are concerned who are employed in work involving the extension, enlargement and improvement of the Gulf Intercoastal Canal and Waterway in the vicinity of Algiers, Louisiana, but also in paragraph VIII of the complaint defendant is charged with having repeatedly violated Sections 7 and 11(c) of the Act since the effective date thereof.

15 This is an action brought by the Secretary of Labor seeking an injunction enjoining defendant from future violations of the Act. The granting or withholding of injunctive relief as prayed for herein and after a full hearing has been had is wholly within the sound discretion of this court. In order that the court might properly exercise such discretion it should be fully advised and informed concerning any matters reflecting upon the probability of future violations of the Act by defendant. In this respect it is proper that the court consider the extent of violations, their nature, the period of time over which they extended, and all other circumstances in determining whether an injunction should issue. *Walling* v. *Rutherford Food Corp.*, 156 F. (2d) 513, affirmed 331 U. S. 722. See also *Caplin* v. *United Feature Syndicate*, 8 F. R. D. 424 (DC NY, 1948) where the court permitted inquiry as to other transactions of defendant which might bear on its good faith in dealing with the plaintiff.

Certainly defendant's past practices and present attitude, insofar as compliance or non-compliance with the Act he is here charged with violating is concerned, are both relevant and material to the issue as to whether or not an injunction should issue as prayed for herein. *Lenroot* v. *Kemp, et al*, 153 F. (2d) 153 (CA 5); *Lenroot* v. *Interstate Bakeries*, 146 F. (2d) 325 (CA 8).

16 Plaintiff respectfully submits that defendant's objections to Interrogatories Nos. III and IV should be

overruled and that defendant should be ordered and compelled to answer same.

Respectfully submitted.

WILLIAM S. TYSON, *Solicitor*
EARL STREET, *Regional Attorney*
T. HAGAN ALLIN, *Attorney*
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

17 Hearing on objections of defendant to Interrogatories II and IV and Order sustaining same, (Minute Entry of October 22, 1952).

(Number and Title Omitted)

This cause came on this day to be heard on objections of defendant to certain interrogatories;

Present: Robert E. Leake, Jr.
Attorney for defendant;
Harry Campbell,
Attorney for plaintiff;

After hearing argument of counsel for the respective parties,

IT IS ORDERED that the objections of defendant to certain interrogatories be, and the same are hereby sustained.

18 REQUEST OF PLAINTIFF FOR ADMISSIONS—Filed December 26, 1952

(Number and Title Omitted)

Comes now Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff above named, and serves the following request for admissions on the defendant above named under Rule 36, Federal Rules of Civil Procedure, to be admitted or denied within ten days from the date of service:

I.

(a) That the operations and place of business of defendant, C. W. Vollmer & Company, Inc., were inspected by a representative of the plaintiff beginning on January 12, 1951.

(b) That the inspection referred to above revealed the fact that many of defendant's employees had been and were employed by defendant for workweeks in excess of 40 hours without payment of additional compensation to such employees for all hours worked in excess of 40 during the workweek at one and one-half times the regular rates at which they were employed.

(c) That following the inspection in January, 1951, plaintiff's representative had a conference with Mr. E. S. Rogers, Superintendent, and Mr. J. C. Laplue, Engineer, representing the defendant, at which time they were fully advised concerning the appropriate provisions of the Fair Labor Standards Act, the corrective measures necessary to bring defendant's employment practices into compliance with said Act, and of defendant's responsibilities thereunder.

19 II.

(a) That following the inspection in January, 1951, numerous conferences were had between representatives of plaintiff and an attorney or attorneys of the law firm of Deutsch, Kerrigan & Stiles representing the defendant.

(b) That during conferences referred to above the question of coverage of defendant's employees under the provisions of the Fair Labor Standards Act was fully discussed.

(c) That defendant's legal counsel denied that defendant's operations subjected defendant to coverage under the Fair Labor Standards Act.

(d) That by letter dated July 31, 1951, William J. Rogers, Regional Director, Wage and Hour and Public Contracts Divisions, United States Department of Labor, wrote to Deutsch, Kerrigan & Stiles, attorneys at law, advising of the basis for the Division's position that the employees of defendant were covered under and entitled to the benefits of the Fair Labor Standards Act and requesting advice as to what steps defendant had taken to effect compliance with the Act.

(e) The copy of letter dated July 31, 1951, referred to in (d) above, attached hereto and marked "Exhibit No. 1," is a true and correct copy of such letter.

III.

That the records of C. W. Vollmer & Company, Inc., reflect that for the following workweeks defendant employed the named employees in the capacities indicated in connec-

tion with the construction of the Earthwork and Emergency Dam Storage, Algiers Lock, Algiers, Louisiana, for more than 40 hours without additional compensation for all hours worked in excess of 40 at one and one-half times the regular hourly rates at which they were employed:

(a) Workweek ending October 7, 1950

P. V. Pace, DL operator
Bobbie Doyle, DL oiler
James Thompson, oiler
L. D. Davis, motor patrol
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Lawrence Payne, mechanic helper
Lucian Logan, truck driver
Lewis Matthews, dump foreman
James Long, euclid
Melvine Miller, euclid
Lonnie Cooper, euclid
Willie B. Lee, euclid
Henry T. Jefferson, euclid
Theo Page, laborer
Nat Brooks, laborer
Will Turner, Jr., laborer
Joseph Banks, laborer
Frank Miller, laborer

20 (b) Workweek ending October 14, 1950

Dewey Porter, DL operator
Mike J. Decker, DL oiler
James Thompson, oiler
L. D. Davis, patrol
Sam Hunter, patrol
Charles Page, bulldozer
Cliff Fleming, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Charles Clark, bulldozer
Lawrence Payne, mechanic helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
James Watson, euclid
Charles Williams, euclid
John W. Mathis, euclid
James Long, euclid
Melvine Miller, euclid
Willie B. Lee, euclid
Henry T. Jefferson, euclid
McKenly Foreman, euclid
Willie Ross, euclid
Chas. B. Bouey, euclid
Leroy Cable, mechanic
Theo Page, laborer
Joseph Wells, laborer
Sammie General, Jr., laborer
Will Turner, Jr., laborer
Frank Miller, laborer
Dave Marks, laborer
August Edwards, labor foreman
William Toney, laborer
Gearry Jimcoily, laborer
Simon Jackson, laborer
Gibson Simoneaux, laborer
Leonce Aydell, laborer
Lester Aydell, laborer
Milton J. Rousseau, laborer
Ambrose R. Rousseau, laborer
Joseph Simoneaux, laborer
Joseph H. Vicknair, laborer

(c) Workweek ending October 21, 1950

P. V. Pace, dragline operator
Mark Phillips, bulldozer
Lucian Logan, truck driver

(d) Workweek ending October 28, 1950

Dewey Porter, DL operator
Mike J. Decker, DL oiler
James Thompson, DL oiler
Leroy Cable, mechanic
Lawrence Payne, mechanical helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
L. D. Davis, patrol operator
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
James Long, euclid driver
Willie B. Lee, euclid driver
Henry Jefferson, euclid
Willie Ross, euclid
Edison F. Jones, euclid
James Watson, euclid
John Mathis, euclid
Lubay F. Bergeron, truck driver
Houston Armstead, laborer
Felix Small, laborer
August Edwards, labor foreman
William Toney, laborer
Will Turner, Jr., laborer
Henry Anderson, laborer
Joe McFadden, euclid driver

(e) Workweek ending November 4, 1950

Dewey Porter, DL operator
P. V. Pace, DL operator
Ed B. Weathers, DL operator
J. M. Clifton, DL oiler
Mike J. Decker, DL oiler
Bobbie Doyle, DL oiler
Walter Waggoner, DL oiler
James Thompson, DL oiler
Lubay F. Bergeron, DL oiler
Leroy Cable, mechanic
Lawrence Payne, mechanic helper
Joe Harris, mechanic helper
Lewis Matthews, dump foreman
Sylvester Jenkins, dump foreman
Lucian Logan, truck driver
Cliff Fleming, bulldozer
Charles Page, bulldozer
Mark Phillips, bulldozer
Leon E. Lewis, bulldozer
Frank Smith, bulldozer
L. D. Davis, patrol operator
James Long, euclid
Willie B. Lee, euclid
Chas. E. Buoey, euclid
Edison F. Jones, euclid
Ernest S. Strong, euclid
Charlie Porter, euclid
John Mathis, euclid
Joe McFaddin, euclid
August Edwards, labor foreman
Houston Armstead, laborer
Felix Small, laborer
Theo Page, laborer
Will Turner, Jr., laborer
Henry Anderson, laborer
James Watson, euclid
Oscar Jimcoily, laborer
Robert Brooks, laborer
Joseph Jackson, laborer

21 (f) Workweek ending November 18, 1950

P. V. Pace, DL operator
Dewey Porter, DL operator
Bobby Doyle, DL oiler
Mike J. Decker, DL oiler
James Thompson, DL oiler
Lawrence Payne, mechanic helper
Lucian Logan, truck driver
Sylvester Jenkins, dump foreman
Sam Hunter, patrol
Mark Phillips, bulldozer
Frank Smith, bulldozer
Frank Hays, bulldozer
James Long, euclid
Edison F. Jones, euclid
Charlie Porter, euclid
Charlie Williams, euclid
John Mathis, euclid
Willie Williams, euclid
Roosevelt Turpin, euclid
Houston Armstead, laborer
Theo Page, laborer
Adolph Anderson, laborer
Robert Brooks, laborer
Master Simon, laborer
Simon Jackson, laborer
Joseph Wells, laborer
Ed B. Weathers, DL operator
S. Guy Scrams, DL operator
Walter Waggoner, DL oiler
J. M. Clifton, DL oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews, dump foreman
L. D. Davis, patrol
Charles Page, bulldozer
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Charles B. Boney, euclid
Willie B. Lee, euclid
Ernest Strong, euclid
James Watson, euclid
Howard Desselle, euclid
Joe McFaddin, euclid
Isaac Minor, euclid
Jack Williams, Jr., euclid
Felix Small, laborer
Henry Anderson, laborer
Oscar Jimcoily, laborer
Joseph Jackson, laborer
Frank Miller, laborer
August Edwards, labor foreman
Lubay F. Bergeron, laborer

(g) Workweek ending November 25, 1950

Dewey Porter, DL operator
P. V. Pace, DL operator
Mike J. Decker, DL oiler
James Thompson, DL oiler
Walter Waggoner, DL oiler
Lawrence Payne, mechanical helper
Lucian Logan, truck driver
Sylvester Jenkins, dump foreman
Charlie Porter, patrol
Mark Phillips, bulldozer
Frank Smith, bulldozer
Frank Hayes, bulldozer
James Long, euclid
Edison F. Jones, euclid
Howard Desselle, euclid
Isaac Minor, euclid
James Watson, euclid
Joe McFaddin, euclid
George King, euclid
August Edwards, labor foreman
Will Turner, Jr., laborer

Frank Miller, laborer
Henry Anderson, laborer
Oscar Jimcoily, laborer
Joseph Wells, laborer
Master Simon, laborer
S. Guy Scrams, DL operator
Ed B. Weathers,
DL operator
J. M. Clifton, DL oiler
Bobbie Doyle, DL oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews,
dump foreman
L. D. Davis, patrol
Charles Page, bulldozer
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Roosevelt Smith, bulldozer
Willie B. Lee, euclid
Ernest Strong, euclid
Simon Jackson, euclid
Chas. B. Boney, euclid
John W. Mathis, euclid
Willie Williams, euclid
Roosevelt Turpin, euclid
Felix Small, laborer
Adolph Anderson, laborer
Noel Carter, laborer
Garay Jimcoily, laborer
Robert Brooks, laborer
Joseph Jackson, laborer
Lubay F. Bergeron, laborer

(h) Workweek ending December 2, 1950

P. V. Pace, DL operator
Dewey Porter, DL operator
Bobbie Doyle, oiler
James Thompson, oiler
Mike J. Decker, oiler
Lawrence Payne,
mechanic helper
Lucian Logan, truck driver
Sylvester Jenkins,
dump foreman
Ed B. Weathers,
DL operator
S. Guy Scrams, DL operator
Walter Waggoner, oiler
J. M. Clifton, oiler
Leroy Cable, mechanic
Joe Harris, mechanic helper
Lewis Matthews,
dump foreman
L. D. Davis, patrol

22 (h) Workweek ending December 2, 1950—continued

Sam Hunter, patrol
Leon E. Lewis, bulldozer
Cliff Fleming, bulldozer
Roosevelt Smith, bulldozer
Willie B. Lee, euclid
Charlie Porter, euclid
James Watson, euclid
Joe McFaddin, euclid
Chas. B. Boney, euclid
Will Turner, laborer
Harry Anderson, laborer
August Edwards,
labor foreman
Charlie Page, bulldozer
Frank Smith, bulldozer
Frank Hayes, bulldozer
James Long, euclid
Edison F. Jones, euclid
Isaac Minor, euclid
John Mathis, euclid
George King, euclid
Felix Small, laborer
Gearry Jimcoily, laborer
Oscar Jimcoily, laborer

(i) Workweek ending June 2, 1951

J. R. Hill, operator
Lawrence Payne, oiler
James Thompson, euclid
Wm. James, bulldozer
Joseph Jackson, laborer
Henry Dixon, motor patrol
Willie Tetter, oiler
Lucian Logan, euclid
August Edwards, euclid
Charlie Page, bulldozer
J. H. Smith, euclid

(j) Workweek ending June 9, 1951

Leroy Cable, mechanic

(k) Workweek ending June 23, 1951

E. C. Johnson, operator
Geo. King, euclid
August Edwards, euclid
Johnnie Jones, euclid
Lonzo Caighton, euclid
Tom Porter, spotter
Jesse Wilson, bulldozer
Sam Hunter, motor patrol
Joe Harris, mechanic helper
Oscar Jimcoily, laborer
Frank Miller, laborer
Manuel LaCrosse, laborer
Davis Oedouet, laborer
Henry Ruffin, laborer
Nathaniel Brooks, laborer
Otha M. Bey, laborer
E. J. Houillion, truck driver
James Thompson, oiler
Leroy Cable, mechanic
J. P. Wolf, oiler
J. C. Walker, euclid
Joe McFaddin, euclid
Dick Brewer, euclid
Tom Moore, spotter
Mack Clark, bulldozer
Charlie Page, bulldozer
Albert Allen, motor patrol
Joseph Jackson, laborer
Joseph Wells, laborer
Master Simon, laborer
Noel Carter, laborer
Lawrence Cook, laborer
Wilbert Ruffin, laborer
A. P. Phillips, laborer
M. S. Foster, foreman
Lucian Logan, truck driver
Lawrence Payne, oiler

(l) Workweek ending June 30, 1951

E. C. Johnson, operator
August Edwards, euclid
Lawrence Payne, oiler
J. P. Wolf, oiler
Lucian Logan, truck driver
Leroy Cable, mechanic

(m) Workweek ending July 7, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
James Thompson, oiler
August Edwards, euclid
Joe McFaddin, euclid
Charlie Page bulldozer
James Wallace, bulldozer
E. J. Houillion, truck driver
Tom Moore, spotter
Oscar Jimcoily, laborer
Joseph Wells, laborer
David Declouet, laborer

Master Simon, laborer
J. R. Hill, operator
S. V. Brooks, oiler
Dick Brewer, euclid
J. C. Walker, euclid
Charlie Clark, euclid
Jesse Wilson, bulldozer
Lucian Logan, truck driver
Leroy Cable, mechanic
Joseph Jackson, laborer
M. S. Foster, foreman
N. B. Forcell, laborer
A. P. Phillips, laborer

23 (n) Workweek ending July 14, 1951

E. C. Johnson, DL operator
J. P. Wolf, oiler
Chas. Page, bulldozer
Lucian Logan, truck driver
J. R. Hill, DL operator
James Thompson, oiler
Jesse Wilson, bulldozer
Joe Harris, mechanic helper

(o) Workweek ending July 21, 1951

E. C. Johnson, DL operator
J. P. Wolf, oiler
Chas. Page, bulldozer
Cliff Fleming, bulldozer
August Edwards, euclid
James Thomas, euclid
Joe Harris, mechanic helper
Joe McFaddin, euclid
Emanuel LaCrosse, laborer
Otha Bey, laborer
A. P. Phillips, laborer
J. R. Hill, DL operator
Stanford Brooks, oiler
Jesse Wilson, bulldozer
J. C. Walker, motor patrol
Geo. King, euclid
James Watson, euclid
Lucian Logan, truck driver
Oscar Jimcoily, laborer
Noel Carter, laborer
Henry Ruffin, laborer
Felix Small, truck driver

(p) Workweek ending July 28, 1951

E. C. Johnson, operator
J. P. Wolfe, oiler
Lucian Logan, truck driver
J. R. Hill, operator
S. V. Brooks, oiler
Felix Small, truck driver

(q) Workweek ending August 11, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
Jesse Wilson, bulldozer
James Thomas, euclid
James Watson, euclid
Joe Harris, mechanic helper
Joseph Jackson, laborer
Nat Brooks, laborer
J. R. Hill, operator
Lawrence Payne, oiler
Cliff Fleming, bulldozer
Joe McFaddin, euclid
Leroy Cable, mechanic
Felix Small, truck driver
Oscar Jimcoily, laborer
James Thompson, euclid

(r) Workweek ending August 18, 1951

E. C. Johnson, operator
J. P. Wolf, oiler
Charlie Page, bulldozer
Cliff Fleming, bulldozer

Joe McFaddin, euclid
Leroy Cable, mechanic
Lucian Logan, truck driver
Joseph Jackson, laborer
Manuel LaCrosse, laborer
Otha Bey, laborer
J. R. Hill, operator
Lawrence Payne, oiler
Jesse Wilson, bulldozer
James Thomas, euclid
James Watson, euclid
Joe Harris, mechanic helper
Felix Small, truck driver
Oscar Jimcoily, laborer
Nat Brooks, laborer
A. P. Phillips, laborer

(s) Workweek ending September 1, 1951

Lawrence Payne, oiler
Charlie Page, bulldozer
Cliff Fleming, bulldozer
Felix Small, truck driver
James Thompson, oiler
Jesse Wilson, bulldozer
Joe Harris, mechanic helper

(t) Workweek ending September 8, 1951

E. C. Johnson, operator
Dewey Porter, operator
James Thompson, oiler
Charlie Page, bulldozer
Joe Harris, mechanic helper
Joseph Jackson, laborer
Otha Bey, laborer
August Edwards, laborer
P. V. Pace, operator
Harold Jones, oiler
J. P. Wolfe, oiler
Jesse Wilson, bulldozer
Felix Small, truck driver
Oscar Jimcoily, laborer
A. P. Phillips, laborer

24 (u) Workweek ending September 15, 1951

Lucian Logan, truck driver

WILLIAM S. TYSON, *Solicitor*
EARL STREET, *Regional Attorney*
T. HAGAN ALLIN, *Attorney*
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

T. Hagan Allin, one of the attorneys of record for the plaintiff, certifies that he served a full, true and correct copy of the within and foregoing Requests for Admissions upon Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorneys for defendant, by placing a copy of the same in the United States mail in a franked envelope addressed to him at his last-known address at Hibernia Bank Building, New Orleans, Louisiana, on the 22nd day of December, 1952.

T. HAGAN ALLIN.

25 ANSWER TO REQUEST FOR ADMISSIONS—Filed Jan. 5, 1953

(Number and Title Omitted)

Defendant makes the following answers in response to the requests for admissions served on it by plaintiff on December 24, 1952:

First

Defendant admits the truth of the matters set forth in Request No. III, all subsections.

Second

Defendant heretofore has filed timely objections to Requests No. I and II, all subsections.

ROBERT E. LEAKE, JR.,
Of DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

CERTIFICATE

I certify that two copies of the foregoing answer to requests for admissions have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 3rd day of January.

ROBERT E. LEAKE, JR.

26 OBJECTION OF DEFENDANT TO REQUESTS FOR ADMISSIONS NOS. I AND II—Filed January 5, 1953

(Number and Title Omitted)

Defendant hereby objects to Requests No. I and II, all subsections, of the requests for admissions served on it by plaintiff on December 24, 1952, on the ground that same are irrelevant to this action and no evidence relating thereto would properly be receivable in evidence on the trial hereof; and objects further that Request No. I(b) is improper because it apparently refers to reports or records of conclusion in plaintiff's hands and not available to defendant, and that Request No. I(c) is improper because it calls for opinions and conclusions of law as to which defendant is not required to comment.

WHEREFORE defendant moves the court for an order striking the requests mentioned above and relieving it from the duty of answering them.

ROBERT E. LEAKE, JR.,
Of DEUTSCH, KERRIGAN & STILES,
1700 Hibernia Bank Building,
New Orleans 12,
Attorneys for Defendant.

NOTICE

To: Honorable Earl Street,
222 Fidelity Building,
Dallas, Texas,
Attorney for Plaintiff.

Please take notice that the foregoing objections to the requests for admissions served in this cause by you on December 24, 1952, will be brought for hearing before the United States District Court at the United States
27 Post Office Building, New Orleans, Louisiana, on Wednesday, January 14, 1953, at 11:00 o'clock A. M., or as soon thereafter as counsel can be heard.

New Orleans, January 3, 1953.

ROBERT E. LEAKE, JR.

CERTIFICATE

I certify that two copies of the foregoing objections and notice thereof have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 3rd day of January.

ROBERT E. LEAKE, JR.

28 PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTIONS TO REQUEST FOR ADMISSIONS—Filed January 12, 1953

(Number and Title Omitted)

The basic objection advanced by the defendant to the Requests for Admissions heretofore filed upon it by the plaintiff is that the evidence sought is irrelevant. Defendant states that it has been unable to find any authorities in point.

It may be conceded for the purpose of this action that Requests for Admissions under Rule 36 of the Federal Rules of Civil Procedure must be directed to obtaining relevant evidence for use in the trial of the proceeding. Nevertheless, plaintiff asserts, and is supported by appropriate au-

thorities that evidence of the nature here desired, that is, the history of past violations and statements of the attitude of the employer-defendant is relevant. It is, of course, too patent to require citation that the issuance of an injunction under Section 17 of the Fair Labor Standards Act (29 U. S. C. 217) is within the sound judicial discretion of the Court, that it is not intended as punishment for past violations but to assure compliance in the future.

It is obvious that the past attitude and the past history of the employer-defendant is material and relevant to enable the Court properly to exercise its sound judicial discretion.

29 The decisions are consistent that in the absence of any intention on the part of the employer-defendant to violate in the future that the Court does not abuse its discretion in denying an injunction. This, of course, requires a determination on the part of the Court of the intention and attitude of the employer-defendant. Such intention or attitude can be determined only from proof of what the employer-defendant has done in the past and the attitude that he has taken in the past.

There are numerous decisions relative to how such intention as to future activities may be determined, two of the principal decisions being from the United States Court of Appeals for the Fifth Circuit.

In the case of *Lenroot* v. *Kemp and Pitts*, 153 F. (2d) 153, an action brought under the child labor provisions of the Fair Labor Standards Act, (29 U.S.C., Sec. 203(1) 215 (a)(4)) the District Court denied an injunction. The record reflected, among other things, investigations which disclosed violations in 1941 and 1943, with reference to Kemp and Pitts and in 1941, 1942, 1943, and 1944, with reference to the Hazlehurst Mercantile Company, a defendant in a companion case, with violations found at each time, and no attempt by the employer-defendants at any time to comply with the Act. The District Judge denied the injunction because of his knowledge of the general standing and reputation of defendants as substantial and outstanding citizens and his belief that they would not violate this law in the future. In reversing the case, and remanding it for the entry of an injunction the Circuit Court said:

> "The repeated, persistent, and deliberate violations by the defendants must be balanced against the reputation of which the trial judge spoke. Confronted with facts showing active violations, belief in the future course of law-observance, based merely upon the de-

fendants' reputation of being law abiding, is not enough. Lip service to a law, with a background of violations, does not guarantee future compliance."

In brief, the evidence there considered by the Circuit Court as *requiring* the issuance of an injunction is substantially the same which this plaintiff has requested through the vehicle provided by Rule 36. Similar result was reached by the Eighth Circuit in *Lenroot* v. *Interstate Bakeries*, 146 F. (2d) 325.

In the case of *Fleming* v. *Jacksonville Paper Company*, 128 F. (2d) 395 at 399, the Circuit Court commented upon the refusal of the trial court to hear evidence relative to the existence of violations during a period prior to the institution of the action. The appellate court said:

> "We think it would have been in order to hear whether the violations were continuing and whether if they had ceased there was no *purpose* to renew them." (Emphasis supplied)

The latest case relative to the propriety of testimony concerning the past history of violations and the attitude taken by an employer-defendant is that *Tobin v. Anthony-Williams Manufacturing Company*, (C.A. 8) 196 F. (2d) 547. In that case, the Court in speaking of the failure of the trial court to grant an injunction for record keeping violations stated that on the record before it the trial court erred in failing to enjoin defendant from record keeping violations. In connection therewith, in addition to pointing out the lack of any testimony relative to future compliance, the court further set forth that

> "Evidence adduced on the trial showed that the defendant had failed to comply up to the time of the trial, *even after two warnings were given.*" (Emphasis supplied).

It is respectfully submitted that the evidence sought to be obtained by plaintiff's Requests I and II is both relevant and material and that the defendant's objections thereto should be overruled.

(S.) Wm. S. Tyson,
Solicitor,
(S.) Earl Street,
Regional Attorney,
(S.) T. Hagan Allen,
Attorney,
United States Department of Labor.

31 HEARING ON OBJECTIONS TO REQUEST FOR ADMISSIONS AND SUBMISSION—(Minute Entry of January 14th, 1953)

(Number and Title Omitted)

This cause came on this day for hearing on objections of defendant to requests for admissions;

Present: Robert E. Leake, Jr., Attorney for defendant;

Counsel for plaintiff being absent;

After hearing statement of counsel for the defendant, the matter was submitted and the court took time to consider.

32 ORDER OVERRULING OBJECTIONS OF DEFENDANT TO REQUEST FOR ADMISSIONS AND ALLOWING DEFENDANT 10 DAYS TO ANSWER THE REQUESTS FOR ADMISSIONS—(Minute entry of January 15, 1953)

(Number and Title Omitted)

This cause came on to be heard on January 14, 1953, on the objections of defendant to requests for admissions and after hearing statements of counsel t[illegible] matter was submitted, when the Court took time to consider;

Now, on due consideration therof;

It is ordered by the Court that the objections of defendant to requests for admissions be and the same are hereby, overruled and defendant is allowed 10 days to answer the requests for admissions:

Lenroot v. *Kemp & Pitts*, 153 F. 2d 153 (C.C.A. 5).

33 ANSWER OF DEFENDANT TO REQUEST FOR ADMISSIONS Nos. I & II—Filed January 23, 1953

(Number and Title Omitted)

With full reservation of all of its rights under its objections to Requests Nos. I & II, all subsections, of the requests for admissions served on it by plaintiff on December 24, 1952, which objections were overruled by the court on January 16, 1953, and expressly reserving all objections which it has, or may have, as to the admissibility, relevance, materiality and evidentiary value of such requests, and the answers herein given thereto, defendant makes the following answers to said requests for admissions:

First

(a) Defendant admits the truth of the matters set forth in Request No. I(a) and (b).

(b) For response to Request No. I(c), defendant admits that following the inspection in January, 1951, a representative of plaintiff conferred with the named employees of defendant and advised said employees of plaintiff's contention that defendant's employees on its job near Algiers, Louisiana, for the construction of the Earthwork and Emergency Dam-Storage, Algiers Lock, were covered by the Fair Labor Standards Act, as a consequence of which, plaintiff advised said employees, defendant should compensate its employees for all hours worked in excess of 40 during any work at one and one-half times the regular rates of pay at which they were employed, and should keep its records so as to reflect such payments.

Second

(a) For response to Request No. II(a), defendant admits that on or about January 16, 1951, an investigator for the New Orleans office of the Wage and Hour Division of the United States Department of Labor, whose name is
34 believed to be Wilenzick, telephoned Robert E. Leake, Jr., Esq., an attorney associated with the firm of Deutsch, Kerrigan & Stiles, counsel for defendant, and advised Mr. Leake that he was conducting an investigation of defendant's operations on the Algiers Lock project, but had not yet made a report. On June 25, 1951, Mr. Leake conferred with Mr. J. Sidney Gonsoulin, Field Office Supervisor of the Wage and Hour Division, United States Department of Labor, New Orleans office, for about one hour. There were no other conferences between the named persons or representatives prior to suit.

(b) For response to Request No. II(b), defendant admits that at the conference of June 25, 1951, mentioned in the preceding paragraph, the subject under discussion was the question of coverage of defendant's employees on the Algiers Lock project under the Fair Labor Standards Act. Discussion, however, was limited because Mr. Gonsoulin advised Mr. Leake at the outset that the matter was out of his hands because a report had been forwarded from his office, and that defendant should submit a written statement of its position. Defendant submitted such statement on June 28, 1951.

(c) Defendant admits the truth of the matters set forth in Request No. II(c) and (d), and states further that plaintiff's letter was promptly answered on August 8, 1951.

(d) Defendant is unable to respond to Request No. II(e), for the reason that said "Exhibit No. 1" is not attached to

the original pleading of record, nor was a copy thereof served on defendant.

ROBERT E. LEAKE, JR.
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Defendant.

CERTIFICATE

I certify that two copies of the foregoing answers to requests for admissions have been served on plaintiff by mailing same to his counsel, Honorable Earl Street, 222 Fidelity Building, Dallas, Texas, this 23rd day of January, 1953.

ROBERT E. LEAKE, JR.

35 MOTION FOR SUBSTITUTION OF PLAINTIFF AND ORDER GRANTING SAME—Filed February 18, 1953

(Number and Title Omitted)

Martin P. Durkin, Secretary of Labor, United States Department of Labor, moves the Court for an order substituting him as plaintiff in the above styled and numbered cause in the place and stead of Maurice J. Tobin, Secretary of Labor, United States Department of Labor, on the ground that the said Maurice J. Tobin has resigned his position as such Secretary and the applicant, Martin P. Durkin, is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that as such Secretary has succeeded to all the rights, duties, and prerogatives of the said Maurice J. Tobin, heretofore appearing as the Secretary of Labor, and as plaintiff in this action, and that there is a substantial need for continuing and maintaining this cause of action.

Dated this 18th day of February, 1953.

WILLIAM S. TYSON,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States
Department of Labor.

Post Office Address: Office of the Solicitor, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

36 ORDER

This cause came on to be heard on motion of the plaintiff to substitute Martin P. Durkin, Secretary of Labor, United States Department of Labor, as plaintiff herein in the place and stead of Maurice J. Tobin, his predecessor in office, and it being satisfactorily shown to this Court that Martin P. Durkin is now the duly appointed and qualified Secretary of Labor, United States Department of Labor, and that there is substantial need for continuing and maintaining the above entitled action and obtaining an adjudication of the questions involved therein, it is

Ordered that Martin P. Durkin, Secretary of Labor, United States Department of Labor, be, and he hereby is, substituted as plaintiff herein in the place and stead of Maurice J. Tobin, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by the said Martin P. Durkin as successor to the rights, duties, and prerogatives of the said Maurice J. Tobin.

Dated this 18th day of February, 1953.

J. SKELLY WRIGHT,
United States District Judge.

February 12, 1953. No objection, submitted without prejudice.

ROBERT E. LEAKE, JR.,
Attorneys for Defendant.

37 TRIAL OF CASE AND SUBMISSION—(Minute Entry of July 5th, 1953)

(Number and Title Omitted)

This cause was this day called for trial without the intervention of a jury:

Present: T. HAGAN ALLIN, HARRY CAMPBELL, Attorneys for plaintiff; ROBERT E. LEAKE, JR., Attorney for defendant.

After various evidence was introduced by counsel for the plaintiff, the following named witness was called and testified on behalf of the plaintiff:

A. A. MATSON,

and, after hearing evidence and testimony on behalf of plaintiff, counsel rested.

Witness for defendant:

CLARENCE VOLLMER,

and, after hearing evidence and testimony on behalf of the defendant, counsel rested. The matter was submitted and the Court took time to consider. Counsel to prepare proposed Findings of Fact and Conclusions of Law within 15 days.

38 TESTIMONY—Filed September 1, 1953

(Number and Title Omitted)

Proceedings had before Honorable J. Skelly Wright, Judge, United States District Court for the Eastern District of Louisiana, in the above entitled and numbered cause, on June 5, 1953, at New Orleans, Louisiana.

* * * * * * *

Appearances: T. HOGAN ALLIN, ESQ., HARRY CAMPBELL, ESQ., Attorneys for Plaintiff; Messrs. DEUTSCH, KERRIGAN & STILES, ROBERT E. LEAKE, JR., ESQ., Attorneys for Defendant.

* * * * * * *

39 Offer:

Mr. Allin: If Your Honor please, plaintiff would like to offer, introduce and file in evidence interrogatories submitted to defendant herein on September 25, 1952, and defendant's responses thereto, and plaintiff's requests for admissions served on defendant on December 22, answered in part on January third, and further answered on January 23, 1953. They will constitute claimant's exhibits Nos. 1, 2, 3 and 4, in that order, I suppose.

The Court: The questions would be one; the answers to the interrogatories would be two; requests for admissions would be three and the further answers to requests for admissions would be four .

Mr. Allin: That is right. They were answered partially, and then later on further answered.

The Court: I think to make the matter crystal clear, suppose you get the exhibits out of the record and mark them as exhibits, and make them part of the record.

Mr. Allin: Yes, sir.

Plaintiff offers in evidence interrogatories which were

filed on February 29, 1952 and served on Counsel for
40 defendant, as exhibit No. 1.

Plaintiff offers in evidence, as exhibit No. 2, defendant's answers to interrogatories, which were filed on October 14, 1952.

Plaintiff offers as exhibit No. 3, requests for admissions, filed on December 26, 1952, and served on Counsel for defendant.

Plaintiff offers as exhibit No. 4, the partial response to plaintiff's requests for admissions, which was filed January 5, 1953.

Plaintiff offers exhibit No. 5, additional responses and answers to plaintiff's requests for admissions, filed January 23, 1953.

Objection:

Mr. Leake: With reference to the interrogatories, I would like to object to the offer of interrogatories three and four, on the ground the objection was timely taken and overruled by the Court; to plaintiff's exhibit No. 3, being the requests for admissions that were served. Counsel for respondent objects to the offer of No. 1 and No. 2 and subsections, and to the introduction in its entirety of plaintiff exhibit No. 5, the Court having overruled the objection which was timely made by the respondent, as to the admissibility, relevancy, materiality and evidentiary value of the case at Bar.
41 Does the Court care to know the nature of those?

The Court: No. The Court has read them. I overrule the objection. The interrogatories speak for themselves.

Mr. Leake: We would like for the objection to be made part of the defendant's case.

The Court: It is so understood.

Mr. Allin: I would like to read into the record the stipulation agreed to between the plaintiff and defendant herein:

Plaintiff, Martin P. Durkin, Secretary of Labor, and defendant, C. W. Vollmer & Company, Inc., a corporation, hereby stipulate as follows. However, each of the parties hereto reserves the right to object to the admission and consideration of any matter contained in this stipulation on grounds of irrelevancy or immateriality, and to introduce other evidence not contradictory of or in conflict with the statements of fact set forth herein:

Mr. Leake: At that particular stage, the only objection I have is as to some of the documents stated in number one, which Counsel will read, the statements he will introduce

in evidence, without making formal proof as to their
42 authenticity.

Mr. Allin: That is correct.

The Court: I believe the statement was, he has a right to object to the relevancy and materiality.

Mr. Allin: That is right.

The Court: Your stipulation is only to the authenticity of the documents?

Mr. Leake: To be discussed after.

Mr. Allin: The following documents may be introduced in evidence, subject to objection on the ground of materiality or relevancy, without making formal proof as to their authenticity.

Mr. Leake: That is substantially correct. I don't want the Court to understand that I am taking the position anything in the documents are admissible per se. The authenticity of the documents, defendant waives.

The Court: All right.

43 Mr. Allin: (a) Senate Document No. 188, 78th Congress, 2nd Session, "Intracoastal Waterway from the Mississippi River at New Orleans, La., to Corpus Christi, Tex.," which is the report prepared by the Corps of Engineers, and Department of the Army, at the request of the Senate, and which report and recommendation was adopted, and the construction disclosed therein authorized by the Act of March 2, 1945, being Public Law 14, marked Plaintiff Exhibit-6.

(b) Construction Contract No. DA-16-047-eng-796 between Corps of Engineers, Department of the Army, and C. W. Vollmer & Company, Inc., which is offered in evidence as Plaintiff Exhibit-7.

(c) Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana, dated 1950, prepared by the Corps of Engineers, U. S. Army, and consisting of contract drawings, maps and specifications (F-1 through F-11) which by the terms of the contract in (b) above were made a part thereof, which is offered in evidence as Plaintiff Exhibit-8.

(d) Nine photostats consisting of statistical information pertaining to the Gulf Intracoastal Waterway between Apalachee Bay, Florida, and the Mexican border, which were prepared by the New Orleans District Office, Corps of Engineers, Department of the Army, for inclusion
44 in the Annual Report of the Chief of Engineers, 1952, entitled "Commercial Statistics, Water-Borne Commerce of the United States, for the Calendar Year 1951,", which is offered in evidence as Plaintiff Exhibit-9.

(e) A photostat entitled "Statement of Barge, Shallow Draft and Other Commerce Between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana," officially prepared by the New Orleans District Office, Corps of Engineers, Department of the Army,", offered in evidence as Plaintiff Exhibit-10.

Mr. ALLIN: If Your Honor please, I tendered to Mr. Leake another document, but I haven't heard from him as to what his position is on that.

Mr. LEAKE: The only problem involved is I have not had opportunity to check the figures involved. I can say this, that as to the authenticity of the paper, being what it purports to be, I have no reason to hold Counsel for that, but as far as evidentiary value and admissibility, I wish to reserve objection to that.

The COURT: All right.

45 Mr. ALLIN: The staff memorandum prepared in the New Orleans District Office of the Corps of Engineers, Department of the Army, at the request of Mr. Fitzpatrick of the Executive Branch, and prepared by Mr. S. J. Palmissano, headquarters, Commercial Statistics, Water-Borne Commerce, under date of May 13, 1953, and offered in evidence as Plaintiff Exhibit-11.

Mr. LEAKE: I don't want to interrupt the offer to make the objection, but I think in connection with the reading of the stipulation, I might make my objection.

The COURT: Does that complete your offer with reference to documents?

Mr. ALLIN: Stipulation Two. Plaintiff's exhibit No. 12 is a true and correct copy of the letter dated July 31, 1951, addressed to and received by Deutsch, Kerrigan & Stiles, Attorneys at Law, Hibernia Bank Building, New Orleans, 12, Louisiana by William J. Rogers, Regional Director, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor.

Stipulation Three. (a) On or about September 10, 1950, defendant, C. W. Vollmer & Company, Inc., began work under the terms of the contract referred to in I(b)
46 above and in accordance with the plans, drawings, maps and specifications referred to in I(c) above.

3(b) The work under said contract was completed on November 29, 1952, and on December 15, 1952, the United States formally accepted the work.

3(c) The work actually done by the defendant and its employees was performed in accordance with the terms of

said contract and the plans, specifications, maps and drawings made a part thereof.

The Court: Does that complete your offer, Mr. Allin?

Mr. Allin: That is right, Your Honor. It does.

Objection:

Mr. Leake: Plaintiff's Exhibit-6, which is Senate Document 188, respondent objects to the admissibility of that document per se.

First, on the ground the document is not the firsthand or best evidence of any of the facts it purports to establish.

Second, the document is a request for appropriation and authorization to perform work, and has no reference to the issues involved in this case; that it amounts to an opinion of the officials who were the authors of the document, at the time the document was written perhaps.

47 Those officials are not present and open to cross-examination by defendant, and may or may not be the current opinion. Furthermore, there is a great portion of the document which is irrelevant to the particular case at Bar. That is the principal objection to Plaintiff Exhibit-6.

The Court: The Court will admit the case is not being tried by a jury, and irrelevant parts will be disregarded. It is a Senate Document and seems to pertain to this Intracoastal Waterway.

Mr. Leake: Yes, it does. The document, such as the document in question, has been held admissible in cases dealing with the Constitutionality of construction projects by the government for years in Oklahoma, and involves the power of Congress to construct dams on Red River, or one of the rivers in the Oklahoma District. That was the attitude of Congress on that particular problem, but no holding that Counsel for respondent has ever been able to find that the document, such as the one in question, is admissible to prove facts of a case involving a private litigant.

The Court: I think the purpose is to show the intention on the part of the Agency charged with the construction of this waterway, as to what the waterway will be and

48 what service it should render. I think that is the purpose of the introduction of the document, and for that purpose I think it is admissible. Is that the purpose?

Mr. Allin: Yes, Sir.

The Court: The Court will admit the document.

Mr. Leake: Exhibits P-9 and P-10 is statistical information which the Corps of Engineers compiled, concerning use of Gulf Intracoastal Waterway at Harvey, and we object to

them as immaterial and irrelevant. This case involves the construction of a project, and the particular documents have no relevancy whatever to the contract in question.

The COURT: The Court will overrule that objection. The theory of the government's case is, as I understand it, is that this particular construction is part of the over-all intracoastal waterway system, and the Court is going to allow the government to put in such evidence.

Mr. LEAKE: In connection with the same objection to P-11, the objection is made that the statistics were not broken down in any way to show whether it is interstate or intrastate movement, which was given to the officials of the Water-Borne Commerce statistical section in connection with lockages and vessels through Harvey Lock for a stated period. Instead of being evidence of facts, it is so broad and general the Court cannot determine what value, if any, could be given to it.

The COURT: The purpose is the need of an alternate route.

Mr. ALLIN: Yes, Sir, showing Harvey Lock as one route available. The purpose of this is to show the need of an alternate route.

Objection:

Mr. LEAKE: We object to P-12, which is a letter from the Regional Director, Mr. Rogers, who is Regional Director of the Department of Labor, to Counsel for respondent, a letter which was passed along in the course of negotiations, or at least discussed between Counsel before the institution of the suit. Counsel objects to the introduction of that letter as immaterial and irrelevant. It has no evidentiary value whatever, and I have to object to that.

The COURT: What is the purpose of the letter?

Mr. ALLIN: The purpose of the letter is to show the evidence reflects the contention between the defendant
49 and the Department over the question of coverage, as to the date the letter is dated, continued violations prior to, and resulting in the filing of this suit seeking injunctive relief. It has some bearing.

The COURT: I overrule the objection. You may proceed.

ALGERION A. MABSON, Witness, being duly sworn on behalf of Plaintiff, was examined and testified as follows:

DIRECT EXAMINATION:

By Mr. ALLIN:

Q. Please state your name?

A. Algerion A. Mabson.

Q. Mr. Mabson, with whom are you employed

A. I am employed with the Corps of Engineers, New Orleans District.

Q. In what capacity?

A. I am Assistant Chief of the Engineering Division.

Q. In your capacity as Assistant Chief of the Engineering Division, do you have anything to do with the various construction contracts entered into between the Corps of Engineers and various contracts in the New Orleans District?

A. Yes, the plans and specifications for various projects are prepared in the engineering division, and the
50 work is processed and advertised, and the contracts awarded. Then all the details of the successful contract are handled by the construction division of the office, but the engineering division has to keep up to date with what is going on during construction.

Q. Have you prepared plans and recommendations for various projects?

A. Yes.

Q. Are you familiar, Mr. Mabson, with the construction project involving the Algiers Lock and Canal?

A. Yes, Sir.

Q. Are you familiar with Senate Document 188?

A. Yes, I am.

Q. Senate Document 188 was prepared and submitted in a report by the Chief of Engineers in 1944. Are you familiar in so far as this document is concerned, Mr. Mabson, with the reasons stated therein, as to an alternate canal at or near the Port of New Orleans, Louisiana?

A. Yes, I have read it.

Q. I ask you, Mr. Mabson, whether or not to your knowledge, in your capacity as Assistant Chief in the Engineering Division, if the reasons for the construction of the Algiers Lock and Canal, as stated in the House Document, are still valid today?

Objection:

51 Mr. LEAKE: I object to the question as entirely too broad to know whether it is valid or not valid.

The COURT: I think you had better rephrase your question.

By Mr. ALLIN:

Q. Mr. Mabson, did you have anything to do with the planning of this alternate route in 1944 when the Senate

had it under consideration, as shown in the Senate Document?

A. No, Sir. I was in the Navy at that time.

Q. You were in charge of the alternate route? You did have something to do with it?

A. Yes, Sir. I returned from Service at the end of 1945, and the first money appropriated for the construction work was 1946, and I was in charge of all planning from that time, from its inception, from its foundation on up, whatever necessary with reference to the document and plan, the program of construction, and also the funds for doing the construction work.

Q. In other words, predicated to some extent, on the information contained in the Senate Document?

A. Yes, Sir. That is correct.

Mr. LEAKE: I would like at this time to state Counsel has propounded an expert question. Counsel for respondent is not satisfied that he is fully qualified as an expert.
52 He is only working for the United States Engineers.

The COURT: You want the witness to answer now whether or not in his opinion the reasons given in Senate Document 188, for the construction of the alternate route are valid today?

Mr. ALLIN: Are valid today. I wish him to state whether or not the reasons stated in Senate Document 188 for the need of construction of the Algiers Lock and Canal, are still valid for those reasons suggested.

The COURT: Isn't this an alternate route or construction?

Mr. ALLIN: It has not been completed. It hasn't been opened to commerce.

The COURT: It is still under construction, but not open to commerce?

The WITNESS: Yes, Sir.

The COURT: I think it fair to assume the reasons stated in 188 are valid, or they would not have been proceeded with.

By Mr. ALLIN:

Q. Mr. Mabson, in your position in the Corps of
53 Engineers, is it necessary for you to, and are you in fact familiar with the Gulf Intracoastal Waterway as a whole?

A. Yes, Sir.

Q. How far does that waterway extend?

A. From my personal knowledge—I haven't been over all of it—but it is authorized from Florida to the Mexican

Border, and I know from reports it has been completed from Florida to the Mexican Border.

Q. Do you know when the Intracoastal Waterway Canal was first planned and authorized, and the extent of the waterway in so far as depth, width, etc., are concerned?

A. They were planned from a series of authorities. I don't remember all of the details. The first intracoastal waterway was started in about 1913, which was five foot depth by forty foot width, and then about 1925 the waterways were enlarged, and the dimensions were nine foot depth by ten foot bottom width. Then in 1942 there was a provision which increased the depth and the width to twelve foot depth and 125 foot bottom width. The project today from Florida in through Louisiana and Texas is twelve foot depth and 125 foot width of the bottom.

Q. What is the purpose of these revised plans?

Mr. Leake: Which revised plans?

54 Mr. Allin: The witness has testified that there have been several changes in the project as far as depth and width.

The Court: What Counsel wants to know is, why the waterway was increased in size, depth and width.

Objection:

Mr. Leake: Unless the witness is qualified to know more about it than he has testified, I object.

The Court: I believe he is in as good position as anybody to testify to the reasons why they depended the channel. I overrule the objection. Answer the question.

A. In the engineering division we have a report section which studies the various projects. In fact, we have one now for study for further enlargement. The 5 x 40 was changed to 9 x 100, because of the increased use of the waterway. As commerce develops, the number of vessels, barges, sizes, increase, it is necessary to provide for increased width. The change from 9 x 100 to 12 x 125 was solely made to decrease the friction on the vessels passing through the waterway, so as to take less power to push the boats through the waterway, and the present study now is to increase it to a fifteen foot depth by three feet wider.

By Mr. Allin:

Q. I understood you to testify, Mr. Mabson, that

55 the plan being made now was being studied for

further improvements to the canal and Coastal Waterways?

A. Yes, Sir.

Q. In other words, that is a constant project with the Corps of Engineers, to make various plans to improve the waterways for the purpose of interstate commerce?

A. No——

Objection:

Mr. LEAKE: I object to that; getting very broad. It is slightly leading. I object.

The COURT: Rephrase your question.

By Mr. ALLIN:

Q. Mr. Mabson, the Corps of Engineers is constantly concerned——

The COURT: Just a minute——

Mr. LEAKE: You are leading him again.

By the COURT:

Q. What is the Corps of Engineers connection with this Intracoastal Waterway?

A. The Corps of Engineers act as agents of the government for constructing projects authorized by Congress. Also the Corps of Engineers make studies that are
56 not authorized by Congress. We don't initiate any studies on your own. Those are all requested by Congress.

Q. In other words, if Congress in it's wisdom feels further construction, or enlargement of the waterway is necessary, the Corps of Engineers have instructions adopted by Congress to effect it's plans?

A. Yes, Sir, and generally the procedure is the local people through their Congressmen get the Corps of Engineers to make a study. Then the Corps of Engineers make a study to find out what they want, and make a report which may be favorable or unfavorable, and that is passed to Congress and Congress acts on it, and in turn authorizes it or not as they see fit.

By Mr. ALLIN:

Q. Mr. Mabson, are you familiar with whether or not the present facilities of the Port of New Orleans, in so far as

east-west and west-east traffic is concerned, are adequate or not?

Objection:

Mr. LEAKE: I object to the question as a very broad question to answer, whether it is adequate or not adequate. No foundation has been laid for that testimony. This gentleman hasn't testified he is familiar with the Statutes involved, or studied any of them.

The COURT: Ask the witness if Congress has au-
57 thorized the Corps of Engineers to make any study, or increase the Intracoastal Waterway in any way.

By Mr. ALLIN:

Q. Mr. Mabson, does the Corps of Engineers have personal authority from Congress to make any study with reference to improvement of Gulf Intracoastal Waterway's facilities?

Mr. LEAKE: The words "improvement of Gulf Intracoastal Waterway", is really going to require technical meaning, and is a question of law which this Court has to decide. I don't want the record to show the witness is testifying that he knows something is an improvement, which the Court will have to decide. He cannot testify to a question of law.

The COURT: Change the word "improvement" and make it "change".

Q. Can you answer that question?

A. Yes, Sir. We have been directed by Congress to make a study to determine whether there should be any change in the present dimensions of the Intracoastal Waterway.

By Mr. ALLIN:

Q. At and in the vicinity of the Port of New Orleans?

A. It is not specifically designed or limited. It is throughout Louisiana and Texas.

58 Q. Have you, in connection with that authority and direction, made any particular study with reference to the facilities at or near, or in the vicinity of the Port of New Orleans?

A. The present study is going on. It has not been completed. It is a matter of opinion, which you may not want. The Harvey Canal is so highly industrialized that the indus-

trial area will physically limit what the practical accomplishments can attain.

Q. What do you mean by that?

A. The Waterway people, local interests we refer to, have asked for a widening of the waterway to 300 feet. When you take the vicinity of New Orleans, meaning say Harvey Canal, every industry is located right on the bank of Harvey Canal, and it would be extremely expensive to widen Harvey Canal; would have to move all of the industries, so to that extent it would be impractical to widen Harvey Canal. It may be possible to deepen it somewhat. The studies have not been completed that far.

Q. Mr. Mabson, in connection with this study and direction of Congress, have you concerned yourself with the volume of traffic utilizing Harvey Canal, the number of lockages, and matters of that nature?

A. We have to weigh the costs against the benefits, involving the number of vessels, the tonnage they han-
59 dle, the saving in time. We haven't completed the study yet.

Q. In your study have you found that the Harvey Lock and Canal——

A. I might try——

Q. Just a minute. Has your study revealed whether or not the Harvey Lock and Canal is capable of handling all traffic desiring to utilize the Gulf Intrastate Waterway?

Objection:

Mr. Leake: I object. All traffic designed to utilize the Gulf Intrastate Waterway would include, I would say, every barge and tug in the United States, which by it's dimensions and draft could navigate the canal. The question is entirely too broad. The man testified the study was not completed yet.

Mr. Allin: Counsel misunderstood the question. Desire to use, not designed.

Mr. Leake: It is still too broad.

By the Court:

Q. As I understand it, what this case is about, is for an alternate route on the Intracoastal Canal?

A. That is what I understand.

Q. And you are building that?

A. Yes, Sir. It is under construction.

60 Q. Why are you building it?

A. We were directed by Congress to do that.

Q. Was it built on the recommendation of the Corps of Engineers, of which you are a part?

A. Public Law 14 by Congress adopted the project as represented by Senate Document 188.

Q. And the reason for building it is predicated on the recommendation of the Corps of Engineers?

A. Yes, Sir.

Q. What was the recommendation of the Corps of Engineers?

A. Fundamentally, it was readily seen during war times and also subsequent studies have shown that on a long time basis, Harvey Lock and New Orleans could not handle it's traffic without excessive delays, and it was readily seen that additional facilities were necessary. As a matter of fact, in the studies presented to Congress, when Harvey Lock was originally built in 1934, it was seen as a traffic increase, and it would be necessary to build a parallel lock to Harvey Canal. As time went on and it was seen that traffic increased to the point where an additional lock was needed, a study was made, and resulted in the determination that a lock was needed, and then the question was where the lock should be, as to whether it should be upstream or downstream, and that is the reason for the additional
61 recommendation to the Senate Document. If a lock was put downstream, the traffic coming out of the lock could proceed through the Industrial Lock, and would not have to pass through the harbor of New Orleans where ship traffic is rather dense.

That was one of the reasons in a subsequent review of the report in 1946 where the people of Westwego tried to have a lock located there, but in the study it was found though the lock could be built in Westwego, it would be better to put it at Algiers.

Q. For the purpose of the record will you state just what is the alternate route of the waterway, what purpose does it serve? Take a vessel coming east through Louisiana. It would enter on the Intracoastal Waterway. It would enter Harvey Lock at Harvey, Louisiana, generally speaking?

A. I lost the trend of that a minute ago. West or east?

Q. Coming east through Louisiana.

A. That is correct. At the present time it would have to go through Harvey Lock to enter the Mississippi River.

Q. And enter the Mississippi River where?

A. At Harvey, Louisiana.

Q. Under the alternative route which is under construc-

tion now, and what this case is about, where would the
62 vessel coming east through Texas into Louisiana, what would it do? As I understand it, they have a choice of either going through the Harvey Lock or going through the alternate route?

A. Yes, Sir.

Q. Assuming he goes through the alternate route, where would he enter the Mississippi River?

A. He would enter the Mississippi River from Algiers, which is about ten miles downstream from Harvey, Louisiana, what they call Cut Off, Louisiana. This is a part of Orleans Parish, and it would be a little bit downstream from the Industrial Canal Lock.

To follow on through with what Your Honor had in mind, if in the future, the way I conceive it, a barge coming west approaches the Mississippi River, it will have the choice of either going to the Mississippi River through Harvey Lock, or through Algiers Lock, as we call the other one, and we believe that choice will be adopted by traffic coming through, whether or not the barge is going straight through, and continue to the east. If it continues on to the east, we believe his choice will be to go through Algiers and cross the river, go through the Industrial Canal Lock and continue on east to Mississippi, Alabama and Florida.

If the barge is going upstream from New Orleans,
63 say going to Donaldsonville or Baton Rouge, we believe when he approaches the Mississippi River, his choice would be to go through the Harvey Lock and proceed upstream, with one exception. We believe the larger boats going upstream will take the new lock, because some of the barges now in a tow have to double trip, can't get them through together. We believe they will be able to in the new lock.

Objection:

Mr. Leake: I meant to make an objection earlier to the Court's preceding questions. I didn't want to interrupt. The first statement concerning instructions and what they were intended for, the testimony is the rankest hearsay, because he was in the Navy at the time and did not return to the Corps of Engineers until after all this occurred.

The Court: Mr. Leake, I don't think you are suggesting what the witness said is not true. You know as well as I do it is absolutely correct.

Mr. Leake: To a certain extent it is.

By Mr. ALLEN:

Q. Mr. Mabson, are you familiar with the type of cargo predominently carried by barge traffic coming west to east on the Gulf Intracoastal Waterway through Harvey Lock?

A. Yes, Sir, from visual observations as well as
64 the report of the lock master, the largest percentage is the oil traffic, petroleum products.

Q. Does that include all types of petroleum products and crude oils?

A. Yes, Sir?

Q. You know what percentage the petroleum cargo constitutes?

A. No, Sir. That varies from time to time. I don't know what it is at present.

Q. Mr. Mabson, traffic utilizing Harvey Lock at the present time, and destined for Mobile, for instance, will you describe the route it must take at the present time from Harvey Lock to Mobile?

A. Traffic on the Intracoastal approaches the Mississippi River through the Harvey Locks, and then enters the Mississippi River, goes downstream to the Industrial Canal Lock and through the Industrial Canal Lock, proceeding to the east to Mississippi and other States.

Q. Is there any hindrance to navigation in the stretch of the present route in the Intracoastal Waterway, between Harvey Lock and the Industrial Lock?

The COURT: You mean the Port of New Orleans?

Mr. ALLEN: I don't have that specifically in mind.
65 Geographically speaking.

A. Well, the Mississippi River—New Orleans is called the Crescent City—the Mississippi River has some curve between Harvey Lock and the Industrial Canal Lock, if that is what you mean.

Q. Is there one particular point that you know of?

A. At Algiers Point, which is just past Canal Street, the Mississippi River makes a ninety degree turn, and during high stages of the Mississippi River it is rather hazardous to navigate around the point. We operate traffic lights on the Mississippi River whenever the stages on the Carrollton gauge are twelve feet or above. We have traffic lights, and have men there for twenty-four hours a day to see that only one ship or vessel at a time rounds the Point. The green light is normally on for downriver traffic, and whenever a barge or tow wants to proceed upstream around Algiers

Point, they have to check the light and turn the red light to downriver traffic so the upriver traffic can proceed. We operate that every time the river gets above twelve feet, or rising stage of the river, and stop when it reaches fifteen or falling stage. The reason for the two differences, the river is more dangerous on twelve feet rising than on falling at fifteen feet.

Q. Does that create any particular danger in so far as barge traffic is concerned?

66 Objection:

Mr. Leake: This witness is no navigating expert apparently. If he wants to qualify him to testify as a navigating expert, it is quite all right. It is also leading.

The Court: The Court will take cognizance of the fact Algiers Point in the river is a very dangerous and hazardous condition, and Algiers Point has been the scene of many, many very serious marine casualties. Let's proceed.

By Mr. Allin:

Q. Upon completion of the Algiers Lock and Canal, and particularly during flood stages on the Mississippi River, is it the plan of the Corps of Engineers and those in charge of operating and controlling contracts in that area of the Port of New Orleans, to ultimately complete the Algiers Lock and Canal, rather than the Harvey Lock?

Objection:

Mr. Leake: Objected to as leading.

The Court: It is leading. I think the witness has testified what use the Algiers Lock would be put to; will probably use the Algiers Lock going east. In any event would use the Algiers Lock, because it would avoid the City of New Orleans.

67 Mr. Allin: I think that is rather repetitious, Your Honor. I just wanted to get that in. I believe that is all.

Cross-Examination.

By Mr. Leake:

Q. How long have you been with the Corps of Engineers?

A. Since February, 1931, with exception of a period in the War Service.

Q. And that was actually what year?

A. My War Service was from July, 1943 to December, 1945.

Q. How long have you been on the staff in New Orleans with the Corps of Engineers?

A. I say with some breaks, not continuously. I started in New Orleans in 1931 until 1936, when I was transferred to the Mineral Wells Texas District. I came back to New Orleans in 1937 and stayed in New Orleans until the early part of 1943 when I went to the Service and stayed from April, 1943 to July, 1945, and after coming out of the Navy I returned to New Orleans, and have been here since.

Q. Just what is your experience? Do I understand you are a graduate engineer?

A. Yes, Sir. I graduated from Tulane and am a registered engineer in the State of Louisiana.

Q. Is your work designing or drafting? What is your work?

68 A. Well, at present I am in what might properly be termed Supervisor, or executive capacity. Previously I had been in the designing. In 1946 when this particular alternate route was initiated, I was in direct immediate charge, and responsible for all the designing of this particular project.

Q. On this project itself?

A. Yes, Sir.

Q. You have nothing to do with the construction end?

A. No, Sir.

Q. Your job is making up plans, to see that from a specification standpoint the plans are sound?

A. Yes. When you say they have nothing to do with construction, the administrative feature of it, we are charged with the responsibility to make occasional inspections to see that the design is carried out, and look after the maintenance work.

Q. In your department that you have been with since 1945 forward, does it have anything to do with making these surveys of the canals and these various engineering projects around this area?

A. Yes, Sir. In other words, it is called the engineering division.

Q. You yourself have nothing to do with the particular research and surveys on the Algiers Lock project

69 now?

A. This Senate Document 188 you are apparently referring to?

Q. Yes.

A. No, Sir.

Q. Have you read Senate Document 188?

A. Yes, Sir.

Q. When was the last time you read it?

A. Well, I would say from one end to the other along about 1947. I reviewed it just this morning, a few passages of it.

Q. So actually, you are very familiar with the construction itself of this new canal and lock?

A. Yes, Sir.

Q. Have you ever read or examined the construction contracts that have been let for this work on the canal and lock?

A. Yes, Sir. As a matter of fact, I wrote some of them.

Q. You know then that there are a number of contracts?

A. Yes.

Q. For different phases of the work?

A. Yes, Sir.

Q. Isn't it true, Mr. Mabson, that the fund for all of those contracts, is expressly subject to continual appro-
70 priation by Congress?

A. I can't answer it broadly. I have to answer it in detail.

Q. All right, Sir.

A. The contracts that we had at the time, the money had been appropriated by Congress. We had the funds in hand. There wasn't any question about the completion of the contracts. There were other contracts that we had, such as bridges, that we didn't have sufficient funds from Congress, and those particular ones were what we call continuing contracts. There is a clause in the contract saying that completion is subject to appropriation by Congress. I don't recall this particular contract offhand, whether it was a continuing contract or not.

Mr. Leake: May I ask the Court for the plaintiff's exhibit, which is the contract?

The Court: (The Court hands document to Mr. Leake).

The Witness: It comes under the limit clause.

By Mr. Leake:

Q. I would like to show you page nine of Plaintiff Exhibit-7, which is the production contract involved in this case. You see the subsection of Section F(c). Look-
71 ing at the contract and provisions of sub-section F(c)-(4), isn't it true this particular contract was con-

tingent upon the completion of continuing appropriations by Congress?

A. Yes, Sir. That is correct.

Q. Isn't it true that from time to time the Corps of Engineers have received authority to make constructions and started the construction of them, and then abandoned them for lack of appropriations?

A. To my knowledge that has never happened.

Q. Are you familiar with the proposed canal the United States Engineers was to construct in the early Thirties, known as the Florida Ship Canal?

A. Yes, Sir.

Q. That canal was designed to provide a canal through the northern part of Florida?

A. Yes, Sir.

Q. And that canal was actually started by the Engineers?

A. Yes, Sir.

Q. And it was abandoned?

A. Yes, but I don't believe the contract was a continuing contract.

Q. But in any event, it was abandoned?

A. Yes, Sir.

Q. The same thing is true currently with reference
72 to the Pontchartrain Protection Levee, which the United States Engineers have?

A. No, Sir, not unless you enlarge your question.

Q. That project has been started and some work done on it?

A. Yes, Sir.

Q. And currently appropriations have been continued for the completion of it?

A. No, Sir.

Q. I may be wrong.

A. It is a rather involved discussion. If you want to go through with it, I will go through with it, but I think you are getting off on the wrong angle. The original work was started in what is called a flood control general project. That was authorized by Congress. All the funds were appropriated. All the work was done as contemplated by the original project.

Subsequent to that a modification of the project was authorized by Congress, and in authorizing the enlargement of the project, the project was immediately changed from a flood control general project to come under flood control of Mississippi River and tributaries. The modification of the original project is considered by Congress as a new

start, and for that reason under the policy set up by Congress in the last four years, they have not author-
73 ized any work or any new starts for any projects, and that is the reason there is no additional authorization for that, because it is a new start. I might say the local people don't understand it either.

Q. Now Mr. Mabson, a vessel proceeding northwest on the Intracoastal Canal has a choice of two canals which they may take, the Plaquemines and the Harvey?

A. They have three choices. Assuming a boat originates west of Morgan City, they could go the Atchafalaya River or Plaquemines route, or proceed to Harvey, and come through Harvey.

Q. What is the length of the Plaquemines Canal?

A. I don't recall. It is something like 100 miles. It is much shorter that way than to Harvey.

Q. That was constructed subsequent to the construction of Harvey?

A. No, Sir, the other way around. Plaquemines was constructed in 1909 and the present Harvey in 1904. There was an older Harvey prior to 1904.

Q. The project with which we are now concerned involves far more than the construction of a lock?

A. Yes, Sir.

Q. The project as a whole is constructed of a canal some nine miles long. Is that right?

A. Yes, Sir.

74 Q. The realignment of the Mississippi River levees at that lock?

A. Yes, Sir.

Q. The construction of guide levees to the new canal and land elevation in the canal?

A. Yes, Sir.

Q. Facing on either side of the locks?

A. Yes, Sir.

Q. And re-location and re-construction of bridges and entrances which open across the rights-of-way to the canal?

A. Yes, Sir.

Q. All of those projects have not been finished?

A. No, Sir.

Q. Have all of the contracts been actually let?

A. No, Sir.

Q. The canal itself is not open to traffic, is it?

A. No, Sir.

Q. It cannot be used in commerce right now, can it?

A. No, Sir, not in the usual sense.

Q. At the present time, the lock structure is not 100 percent finished, is it?

A. No, Sir.

Q. The earthwork levee leading from the lock structure to the Mississippi River levees in Algiers have not been tied in with those levees?

75 A. No, Sir.

Q. Various work is to be done on those levees before operating?

A. Yes, Sir.

Q. As a matter of fact, they are not up to grade?

A. No, Sir.

Q. Another contract will have to be let for that work?

A. Yes, Sir.

Q. To your knowledge, does the Corps of Engineers have Congressional appropriations earmarked for that work?

A. Yes, Sir.

Q. You are familiar with the contract in this particular case?

A. Yes, Sir.

Q. The contract has solely to do with that lock structure and the levees leading from that to the Mississippi River, that we have just discussed?

A. Yes, the backfill of the lock structure.

Q. And before the work which was accomplished under this contract can be put in operation, there must be another contract let for additional work on the same object or construction. Is that right?

A. Yes, Sir. When you say additional contract, it might be more accurate to say additional work. It is con-

76 ceivable the government may perform it with it's own force.

Q. The canal itself is not completely dredged, is it?

A. No, Sir.

Q. Now until the project is completed, it can not be used as a part of the Gulf Intracoastal Waterway canal, can it?

A. No, Sir.

Q. Assuming that it is completed, and assuming it is placed in order, so far as your knowledge extends, there is no plan to abandon the Harvey Lock or Harvey Canal, is there?

A. No, Sir, none whatsoever.

Q. Are there current plans, or at least a survey, so far as you personally know, towards the further improvement of the Harvey Canal and the Harvey Locks, that is, the locks themselves, through another lock on the Harvey Canal, or enlargement of the lock, or deepening of the Harvey Canal?

A. You are separating two parts. There is no study of the lock itself. The study was by Congress to deepen and enlarge the canal.

Mr. LEAKE: That is all. Thank you Mr. Mabson.

REDIRECT EXAMINATION.

By Mr. ALLIN:

Q. Mr. Mabson, at the present time work is being done under the contract on the Algiers Lock and Canal?

77 A. Yes, Sir.

Q. When is it contemplated, so far as the Corps of Engineers is concerned, what is the contemplated completion date?

A. The present plan at the end of December, 1954.

Q. In so far as you know, do you consider that a reasonable date?

A. Yes, Sir, we consider it reasonable.

Q. And the other contracts with reference to portions of the canal that Mr. Leake interrogated you about, will be let from time to time?

A. Yes, Sir.

RECROSS-EXAMINATION.

By Mr. LEAKE:

Q. That is, Mr. Mabson, if Congress appropriates the funds to cover?

A. Yes, Sir, entirely dependent upon that.

Q. And if Congress doesn't appropriate the funds, the contract won't be let?

A. We will have to wait.

Q. And the Corps of Engineers has no control over the funds?

A. No, Sir.

Mr. LEAKE: That is all.

78 Mr. ALLIN: Plaintiff rests.

79 TESTIMONY ON BEHALF OF DEFENDANT:

CLARENCE VOLLMER, Witness, being duly sworn on behalf of defendant, was examined and testified as follows:

DIRECT EXAMINATION:

By Mr. LEAKE:

Q. Please state your name?
A. Clarence Vollmer.
Q. Please state your business?
A. Contractor.
Q. What is the name of your company?
A. Clarence W. Vollmer & Company, Inc.
Q. What is your position with the company?
A. I am President of it.

Q. In your capacity as President of Clarence W. Vollmer & Company, what connection, if any, did you have with the performance of the construction contract on the Algiers Lock in the Parish of Orleans?

A. I prepared the bid and supervised the work and completed the project.

Q. Have you ever examined the situs of the work?
A. Yes, Sir, at the time of bidding.

Q. Since?
A. Yes, Sir.

Q. Do you know where the physical location of the Mississippi River in the vicinity of New Orleans is?

80 A. Yes, Sir, I do.

Q. And do you know the present physical location of the Gulf Intracoastal Waterway Canal in the vicinity of New Orleans?

A. Yes, sir.

Q. During the time in which your company was engaged in this work on the Algiers Lock, will you please state what connection, if any, the lock or the canal for which the lock was destined, had with either the Mississippi River or the Gulf Intracoastal Waterway Canal?

A. At the time our contract was let, and we started on our portion of the work, the only thing constructed at the Algiers Locks, were the locks, the concrete work, with the exception of the gates; no canals on either end, north end or south end. The locks set out in the swamps, and our contract was to build guide levees on the Mississippi River on the east end, and backfill the lock. When we completed our contract, during the interim, a contract had been let

for about a mile and a half for a new operation on the east end from the lock to the Mississippi River, and nothing done to it. We had the guide levee at the east end of the lock to the Mississippi River, and built a guide levee to the two stations down on the south end.

Q. Two stations about 200 feet?

A. A couple of hundred feet, yes.

81 Q. Was the performance of your contract ever formally accepted by the United States?

A. Accepted by the Corps of Engineers.

Q. I would like to ask you if you can identify the document which I now show you?

A. Yes, Sir.

Q. What is that?

A. Acceptance formally by the Corps of Engineers, New Orleans District.

OFFER: Mr. LEAKE:

In connection with the testimony of the witness I offer and file in evidence as D-1, the letter dated 23 January, 1953.

Q. Will you please state whether or not the Corps of Engineers examined the operations, or made any comment or whatever they did, of the payroll records on this particular contract?

A. We furnished the Corps of Engineers with the necessary copies they requested, sometimes one, two or three. In this particular case three copies were furnished, one at the field office, two at the foot of Prytania Street, with form of affidavit certifying them and I don't think we had a mistake or correction of any kind on the payrolls. It was in compliance with the demands of the contract.

Q. Answer any questions Mr. Allin will ask you?

82 A. Yes, Sir.

Mr. ALLIN: No questions.

Mr. LEAKE: As a further part of the defendant's case, Counsel would like to offer, introduce and file in evidence, the Answer, D-2; the objection to interrogatories filed by respondent on or about October tenth, marking it D-3; the objection to the requests for admissions filed by respondent on or about the third day of January, marked D-4.

I might suggest I have no objection to the offer of the substitution of Mr. Durkin as plaintiff.

That is the defendant's case, Your Honor.

Mr. ALLIN: Plaintiff rests.

83 OPINION OF THE COURT—Filed June 25, 1953

(Number and Title Omitted)

Earl Street, Regional Attorney.

T. Hogan Allin, Harry Campbell, Attorneys for Plaintiff.

Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Attorneys for Defendant.

WRIGHT, District Judge:

Plaintiff brings this action seeking to enjoin the defendant from violating the provisions of Sections 7 and 11(c) of the Fair Labor Standards Act [1] relating to the non-payment to employees of overtime and failure to keep proper employee work records. The question presented is whether the defendant's employees are "engaged in commerce" within the meaning of Section 7(a) of the Act.

The defendant entered into a contract with the United States through the Corps of Engineers, Department of the Army, under the terms of which defendant agreed to construct an earth-work embankment and concrete platform for Algiers Lock, Orleans Parish, Louisiana. Algiers Lock is part of the proposed Algiers Lock & Canal. Algiers
84 Lock and Canal will be a part of the Gulf Intracoastal Waterway and will serve as an alternate lock and canal connection with the Mississippi River in the vicinity of the Port of New Orleans. The present connection in that vicinity, Harvey Lock and Canal, is proving inadequate alone to handle the volume of traffic in the Gulf Intracoastal waterway.

The Gulf Intracoastal Waterway from Apalachee Bay, Florida, to the vicinity of the Mexican Border is an instrumentality of interstate commerce and is regularly navigated by vessels and barges in transporting goods in interstate commerce. At the present time eastbound navigation on the Gulf Intracoastal Waterway enters the Mississippi River from the Harvey Lock and Canal and then proceeds down river 5.5 miles to the Industrial Lock and Canal where it leaves the river. Westbound navigation, of course, reverses this procedure. The stretch of 5.5 miles in the Mississippi River is through the harbor of New Orleans where intracoastal traffic must compete with ocean-going traffic for room to navigate. In addition, the banks of the river on both sides are highly developed with commercial facilities including docks and wharves serving the Port of New Orleans.

[1] 29 U.S.C. § 201 et seq.

Further, there is along this stretch Algiers Point, which marks an acute bend in the river. The navigation of this point by both ascending and descending traffic is particularly difficult because of the swift current moving down river.

The current federal project for intracoastal waterways, as outlined in Senate Document 188,[2] includes, in addition to the construction of Algiers Lock and Canal, the improvement, enlargement and extension of the Gulf Intracoastal Waterway by increasing its present depth and width and extending it west and south to the Mexican Border. This project also covers the cutting of a canal through northern Florida thereby connecting the Gulf Intracoastal Waterway with the Atlantic Intracoastal Waterway. The
85 completion of the project depends on the continued appropriation of federal funds.

Algiers Lock and Canal, which has not been completed, is entirely new construction. The proposed nine mile canal does not follow any pre-existing right of way and, when completed, will not replace any existing canal or other navigable waterway. As has been stated, it will simply be an alternate route for entering the Mississippi River from the west and leaving it from the east. Its primary purpose in addition to relieving the congestion which now obtains in Harvey Lock and Canal, will be to eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point.

The government alleges that Algiers Lock and Canal is merely an improvement of the existing waterway being constructed pursuant to the over-all project for the improvement and enlargement of the intracoastal waterways of the United States as outlined in Senate Document 188. As such, the government contends, the employees working on the construction of the Algiers Lock are "engaged in commerce" or so closely connected thereto they are covered by the Fair Labor Standards Act. The defendant on the other hand maintains that the building of Algiers Lock is new construction and therefore employees concerned with the building of the lock are not covered.

The question presented here for adjudication is an extremely narrow one. It is clear that persons engaged in the maintenance and repair of interstate instrumentalities are within the coverage of the act. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125; *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, 324 U. S. 720; *Alstate Con*

[2] 78th Congress, 2nd Session.

struction Company v. *Durkin*, 345 U. S. 13; *Thomas* v. *Hempt Bros.*, 345 U. S. 19. It is likewise clear that persons engaged in the construction of new interstate instrumentalities are not covered by the act. *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43; *J. F. Fitzgerald Company* v. *Pedersen*, 324 U. S. 720; *Nieves* v. *Standard Dredging Corporation*, 152 F. 2d 719 (CCA 1); *Laudadio* v. *White*
86 *Construction Company*, 163 F. 2d 383 (CCA 2); *Reed* v. *Murphey*, 168 F. 2d 257 (CCA 5); *Scholl* v. *McWilliams Dredging Company*, 169 F. 2d 729 (CCA 2); *Koepfle* v. *Garavaglia*, 209 F. 2d 191. Consequently, does the building of Algiers Lock and Canal amount to maintenance and repair of the Gulf Intracoastal Waterway or is it new construction as defined in the cases cited?

Although the government argues that the Algiers Lock and Canal is merely an improvement of the existing waterway, no cases are submitted which hold that improvement of an interstate instrumentality through the construction of a new or alternate route is covered by the act. All of the government cases relate to the improvement of an existing instrumentality by the construction of revetments and the like in the instrumentality itself. *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. 2d 945; *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286 (CCA 4); *Schmitt* v. *War Emergency Pipelines*, 175 F. 2d 335 (CCA 8); *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. 2d 334 (CCA 10); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (CCA 9); *Walling* v. *McCrady Const. Co.*, 156 F. 2d 932 (CCA 3).

It is true that the Supreme Court has held that the provisions of the Fair Labor Standards Act should be liberally construed in order to carry out the basic social purpose of the act. *Tennessee Coal Company* v. *Muscoda Local No. 123*, 321 U. S. 590, 597. However, in 1949 Congress, apparently motivated by a feeling that the courts had gone too far in extending coverage, amended the act limiting the coverage to some extent. Amendment of Oct. 26, 1949, Chapter 763, Section 3, 63 Stat. 911, 29 U.S.C. § 203(j). Statement of House Conferees, Report No. 1453, 81st Congress pp. 14-15. While the amendment does not bear on the point at issue here, nevertheless, it does show that Congress in passing the Fair Labor Standards Act did not intend that coverage under the act would be co-extensive with the power of Congress to control interestate commerce. This fact has been recognized by the courts. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517; 523; *Walling* v. *Jacksonville Paper Co.*, 317
87 U. S. 564. Under the test for coverage as judicially determined the work in question must either be "in commerce" or so closely connected thereto as to be

a part thereof. *Pedersen* v. *Delaware L. & W. RR.*, 229 U. S. 146; *Overstreet* v. *North Shore Corp.*, supra.

In applying this rule, the Wage and Hour Division itself draws a distinction between original construction and repair or reconstruction.[3] The recognition by the Division that new construction is not covered by the act, while not controlling, is highly persuasive. *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, n. 129; *Koepfle* v. *Garavaglia*, 200 F. 2d 191, 193. Unless the fact that the Algiers Lock and Canal will become a part of an existing waterway after it is completed makes the building thereof "repair or reconstruction", under the Division's own interpretation, defendant's employees are not covered by the act.

Since there is no authoritative holding respecting coverage under the Fair Labor Standards Act of work performed in the construction of an alternate route for an existing interstate instrumentality, guidance may be sought from decisions interpreting coverage under the Federal Employers Liability Act.[4] *Overstreet* v. *North Shore Corp.*, supra. So doing, there is the case of *Raymond* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, supra, in which the railroad, an inter-

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[3] In the Wage Hour Manual, Bureau of National Affairs Labor Relations Reporter, Volume 6, the rule is interpreted as follows:

10:237:

"In interpreting the Act's application to the employers in the building and construction industry, the Wage and Hour Division and the courts have drawn a distinction between the original construction of buildings or facilities and the repair or reconstruction."

10:238:

"The distinction between original construction and repair or reconstruction has also been recognized by the numerous lower federal and state courts which have decided cases involving the Act's covering of building and construction operations."

Wage and Hour Division Bulletin No. 5 of October, 1940, page 7, paragraph 12 reads as follows: "The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus it is our opinion that employees engaged in original construction of buildings are not generally within the scope of the Act, even if the building when completed will be used "to produce goods for commerce."

[4] Before the 1939 amendment to Federal Employers Liability Act expanded coverage under that Act. 53 Stat. 1404; 45 U.S.C. § 51; *Overstreet* v. *North Shore Corp.*, *supra*.

state carrier, was engaged in construction of a tunnel for the purpose of "shortening its main line and making more efficient and expeditious its freight and passenger service." One of its employees was injured in the construction of the tunnel and filed suit under the Federal Employers Liability Act. At the time of the injury the tunnel was not complete and was not connected with the main line of the railroad. In denying recovery, the Supreme Court held "it is certain that Raymond and the railroad company were not engaged in interstate commerce at the time the injuries were suffered".

The new construction doctrine[5] of the Raymond case has been applied in cases brought under the Fair Labor Standards Act and it would seem that the principles there announced are applicable here. *J. F. Fitzgerald Company* v. *Pedersen*, supra; *Nieves* v. *Standard Dredging Corp.*, supra; *Landadio* v. *White Const. Co.*, supra; *Reed* v. *Murphey*, supra; *Scholl* v. *McWilliams Dredging Company*, supra; *Koepfle* v. *Garavaglia*, supra. If the government were simply building a canal which, when completed, would connect two interstate waterways, it would hardly be asserted that the work on such construction was within the coverage of the act. The mere fact that the Algiers Lock and Canal, when completed, will become a part of the integrated system of inter-coastal waterways of the
89 United States should not change this conclusion.

Until the Algiers Lock and Canal is dedicated to and used for interstate commerce, it cannot be said that the work thereon is "in commerce" or so closely connected thereto as to be a part thereof. As a matter of fact, should Congress fail to appropriate the necessary funds, Algiers Lock and Canal will never be completed and consequently it would then never become an artery of commerce. See *Parham* v. *Austin*, 158 F. 2d 566 (CCA 5).

Judgment accordingly.

(8) J. Skelly Wright,
United States District Judge.

New Orleans, Louisiana, June 25th, 1953.

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[5] The new construction doctrine was first recognized in *Pedersen* v. *Delaware L. & W. RR.*, 229 U. S. 146, at page 152:

> "Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

90 JUDGMENT DISMISSING SUIT AT PLAINTIFF'S COST—filed July 9, 1953

(Number and Title Omitted)

This cause came on for hearing on June 5, 1953.

PRESENT:

Harry Campbell, Jr., Esq., T. Hagan Allin, Esq., Attorneys for Plaintiff.

Messrs. Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Esq., Attorneys for Defendant.

The court having considered the pleadings and the evidence adduced and briefs filed by both parties, and having, on June 25, 1953, handed down its written opinion that the action should be dismissed:

It is ordered, adjudged and decreed that the within action be, and it is hereby, dismissed at plaintiff's cost.

New Orleans, July 7th, 1953.

J. SKELLY WRIGHT,
United States District Judge.

91 AMENDED JUDGMENT—filed July 20, 1953

(Number and Title Omitted)

The judgment heretofore entered herein on July 7th, 1953, is vacated and set aside, and the following judgment is now entered:

This cause came on for hearing on June 5, 1953.

PRESENT:

Harry Campbell, Jr., Esq., T. Hagan Allin, Esq., Attorneys for Plaintiff.

Messrs. Deutsch, Kerrigan & Stiles, Robert E. Leake, Jr., Esq., Attorneys for Defendant.

The Court having considered the pleadings and the evidence adduced and briefs filed by both parties, and having, on June 25th, 1953, handed down its written opinion that the action should be dismissed:

It is ordered, adjudged and decreed that the within action be, and it is hereby, dismissed.

New Orleans, July 20th, 1953.

(S) J. SKELLY WRIGHT,
United States District Judge.

92 NOTICE OF APPEAL—filed September 2, 1953

(Number and Title Omitted)

Notice is hereby given that Martin P. Durkin, Secretary of Labor, United States Department of Labor, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Court's final judgment and decree filed and entered in this action on July 27, 1953, denying plaintiff the injunction sought and dismissing the action.

STUART ROTHMAN,
Solicitor,
EARL STREET,
Regional Attorney,
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas, or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

93 DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed September 2, 1953

(Number and Title Omitted)

To the Clerk of the Above Named Court:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure the plaintiff appellant hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed on September 2nd, 1953, the complete record and all of the proceedings and evidence in this case.

STUART ROTHMAN,
Solicitor;
EARL STREET,
Regional Attorney;
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas, Texas or Office of the Solicitor, U. S. Department of Labor, Washington 25, D. C.

CERTIFICATE

T. Hagan Allin, one of the attorneys of record for Martin P. Durkin, Secretary of Labor, United States Department of Labor, does hereby certify that he has served a true and correct copy of the foregoing Designation of Contents of Record on Appeal on Mr. Robert E. Leake, Jr., of the firm of Deutsch, Kerrigan & Stiles, attorney of record for defendant, by depositing same in the United States mail in a franked envelope addressed to him at his address of record in this case, on the 31st day of August, 1953.

T. HAGAN ALLIN.

94 MOTION AND ORDER TO TRANSMIT EXHIBITS IN ORIGINAL TO COURT OF APPEALS—Filed September 8, 1953

(Number and Title Omitted)

Plaintiff moves the Court for an Order transmitting to the United States Court of Appeals for the Fifth Circuit the originals of plaintiff's exhibits Nos. 6 (Senate Document No. 188, 78th Cong., 2d Session), 7 (Contract No. DA-16-047-eng-796), 8 (Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana), 9 (Nine photostats reflecting commercial statistics, water-borne commerce on the Gulf Intracoastal Waterway between Appalachee Bay, Florida, and the Mexican Border), and 10 (Photostat entitled "Statement of Barge, Shallow Draft and other Commerce between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana"), introduced in evidence at the hearing in the above entitled and numbered action on June 5, 1953, for the following reasons:

Plaintiff has designated for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, the complete record of all the proceedings, evidence and exhibits in the case, and the said exhibits are essential to the consideration of this case by the Court of Appeals, and the said exhibits are voluminous and bulky and the Clerk of this Court would necessarily encounter extreme difficulty in reproducing copies thereof due to lack of necessary facilities.

STUART ROTHMAN,
Solicitor;
EARL STREET,
Regional Attorney;
T. HAGAN ALLIN,
Attorney,
United States Department of Labor.

Post Office Address: Earl Street, Regional Attorney, U. S. Department of Labor, 222 Fidelity Building, Dallas 2, Texas or Office of the olicitor, U. S. Department of Labor, Washington 25, D. C.

95 ORDER

Now on this 9th day of September, 1953, the Court, being fully advised in the premises, finds and orders that the originals of plaintiff's exhibits Nos. 6 (Senate Document No. 188, 78th Cong., 2d Session), 7 (Contract No. DA-16-047-eng-796, 8 (Plans for Earthwork and Emergency Dam Storage, Algiers Lock, Orleans Parish, Louisiana), 9 (Nine photostats reflecting commercial statistics, water-borne commerce on the Gulf Intracoastal Waterway between Appalachee Bay, Florida, and the Mexican border), and 10 (Photostat entitled "Statement of Barge, Shallow Draft and other Commerce between Mississippi River and Gulf Intracoastal Waterway at Harvey, Plaquemine and Industrial Canal Locks, Louisiana"), introduced in evidence at the hearing in the above entitled and numbered action on June 5, 1953, should and shall be transmitted to the United States Court of Appeals for the Fifth Circuit as a part of the record on appeal.

J. SKELLY WRIGHT,
United States District Judge.

APPROVED:

T. HAGAN ALLIN,
Attorney for Plaintiff.
DEUTSCH, KERRIGAN & STILES,
ROBERT E. LEAKE, JR.,
Attorney for Defendant.
September 1, 1953.

96 CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify that the foregoing 95 pages contain and form a full, true and complete transcript of the record in the cause entitled "Maurice J. Tobin, Secretary of Labor, United States Department of Labor vs. C. W. Vollmer & Company, Inc., a Corporation" Number 3280 of the Civil Action Docket of

this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, La., this 16 day of September, A. D., 1953.

A. DALLAM O'BRIEN,
Clerk.

[SEAL]

By (S.) ANDREW J. BACON,
Deputy Clerk.

64 In United States Court of Appeals

No. 14749

MARTIN P. DURKIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

C. W. VOLLMER & COMPANY, INC.

Minute entry of Order of Substitution

October 29, 1953

On consideration of the motion filed by appellant to substitute James P. Mitchell, Secretary of Labor, United States Department of Labor, as appellant herein in place of Martin P. Durkin, former Secretary of Labor, United States Department of Labor, resigned:

It is ordered that James P. Mitchell, Secretary of Labor, United States Department of Labor, be substituted as appellant herein in place of Martin P. Durkin, former Secretary of Labor, United States Department of Labor, resigned.

* * * * *

65 *Minute entry of argument and submission*

April 19, 1954

[Omitted in printing.]

* * * * *

66 In the United States Court of Appeals for the Fifth Circuit

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

C. W. VOLLMER & COMPANY, INC., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(June 30, 1954)

Before STRUM and RIVES, Circuit Judges, and DAWKINS, District Judge

Opinion of the Court

Filed June 30, 1954

PER CURIAM: We find ourselves in agreement with the views expressed by the learned district judge and approve his opinion reported in 113 F. Supp. 235, et seq. See also the later opinion of this Court in *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d
67 510, and *Billeaudeau, et al.* v. *Temple Associates, Inc.*, No. 14,931, Ms., decided June 18, 1954. The judgment is therefore

AFFIRMED.

68 In United States Court of Appeals

No. 14749

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

C. W. VOLLMER & COMPANY, INC.

Minute entry of judgment

June 30, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

69 [Clerk's certificate to foregoing transcript omitted in printing.]

70 Supreme Court of the United States

[Title omitted.]

Order extending time to file petition for writ of certiorari

Filed September 22, 1954

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1954

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 22d day of September 1954.

72 Supreme Court of the United States

No. 387, October Term, 1954

[Title omitted.]

Order allowing certiorari

Filed November 22, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1954